

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1239-CR

Cir. Ct. No. 2002CF143

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SOU W. HER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Sou Her appeals from a judgment of conviction of false imprisonment while armed and masked and carjacking while masked. He also appeals from an order denying his postconviction motion for resentencing. He argues that the prosecution breached the plea agreement when it explained to

the sentencing court why the agreed-upon recommendation was so much less than the sentence imposed against Her's co-defendant and that his trial counsel was ineffective for not objecting to the breach of the plea agreement. We affirm the judgment and order.

¶2 On October 25, 2000, Her and Tong Xiong entered a home, subdued and bound the homeowner, and stole the homeowner's pick-up truck. Xiong was arrested two years prior to Her and received concurrent sentences of ten years initial confinement (IC), four years extended supervision (ES) and fifteen years IC, ten years ES for convictions of false imprisonment and carjacking.

¶3 Her was originally charged with three crimes. A plea agreement was reached by which the prosecutor agreed to dismiss the witness intimidation charge and make a recommendation for a total sentence of ten years IC, five years ES. Under the agreement, Her was free to argue for any sentence. The offer was based on the prosecutor's belief that Xiong was sentenced to a total of ten years IC, five years ES, and that the prosecution's sentencing recommendation would be equal to Xiong's sentence. Just before the sentencing hearing, the prosecutor informed Her's trial counsel that in fact Xiong received a longer sentence than the prosecutor originally believed and that the prosecutor would stand by the terms of the plea agreement. The prosecutor also indicated that if the sentencing court inquired why the recommendation was less than the sentence Xiong received, the prosecutor would give a truthful answer that the plea agreement was based on the prosecutor's mistake. Trial counsel informed Her of the prosecutor's message.

¶4 At sentencing the court immediately asked the prosecutor why the recommendation was so much less than Xiong's sentence. The prosecutor explained his mistake:

Well, I will tell you, Judge, because my notes from the companion case indicated that I did ask for 25 years total, fifteen and ten, my notes indicate I was, therefore, understanding that Judge Stangel ordered ten and five. Once I read the PSI, where they got fourteen from, I don't know how they got that fourteen incarceration, but I then went back to CCAP and plus back to the judgment of conviction, although it was difficult because of the number of cases involved and there appear to be, I am not quite sure whether it was consecutive or concurrent, it appeared to me at that time after I made the offer in good belief that Mr. Xiong had received ten and five that, in fact, according to my notes he had received, I believe it was fifteen and ten. So I'm not, I was looking at treating them the same but because my notes did not reflect in the file which is odd because I was there and was writing this down as this was happening for some reason I believe that my notes reflect that Mr Xiong received ten and five, not the fifteen and ten I believe he got, and then in looking, after reading the PSI, the PSI author was saying well 14 years of incarceration. I said, what the heck is this? There was an amended judgment of conviction and in looking very closely I am trying to figure out, it did appear that he did receive more. I told [defense counsel] a few minutes ago I made the offer, that's what I am going to recommend. If the Court asks me this question I would truthfully answer as to why it was less than the co-defendant and that's why.

¶5 There was no objection by Her to the prosecutor's statement. The court indicated that it had personally verified the length of Xiong's sentence by examination of the automated docket entries. Whereas the prosecutor argued it was impossible to tell which of the two intruders was the primary aggressor, Her argued that he was the less culpable actor and should receive a shorter sentence. The sentencing court found it appropriate to impose a sentence comparable to the sentence Xiong received because it was a joint criminal enterprise and each should be held responsible for their respective participation and the impact it had on the victim. Her was sentenced to concurrent terms of ten years IC, four years ES and fifteen years IC, ten years ES for the false imprisonment and carjacking convictions.

¶6 A *Machner*¹ hearing was held on Her's motion for postconviction relief. Trial counsel admitted that he did not suggest to Her that revelation that the agreement was based on the prosecutor's mistake as to Xiong's sentence would constitute a breach of the plea agreement. The trial court concluded that the prosecutor did not breach the plea agreement and trial counsel's performance was not deficient.

¶7 Her argues that the prosecutor's explanation of the mistake in the plea offer subverted the benefit for which Her bargained and therefore, is an actionable breach requiring resentencing. Whether the prosecution's conduct constitutes a substantial and material breach of a plea agreement is a question of law.² *State v. Williams*, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. We determine questions of law independently of the trial court but benefiting from its analysis. *See id.*, ¶5. "A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." *Id.*, ¶38. The prosecution is not allowed to covertly convey to the trial court that a more severe sentence is warranted than that recommended. *Id.*, ¶42.

¶8 We first observe that the prosecutor did not set out to undermine the sentencing recommendation and was only responding to an inquiry from the

¹ A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

² We acknowledge that because Her did not object to the prosecutor's conduct at sentencing, he waived the right to direct review of the alleged breach of the plea agreement and the claim must be addressed in the form of a claim of ineffective assistance of trial counsel. *State v. Howard*, 2001 WI App 137, ¶12, 246 Wis. 2d 475, 630 N.W.2d 244. A threshold determination in the effective assistance analysis is whether the prosecution breached the plea agreement because if no breach occurred, trial counsel's failure to object is not deficient performance. *State v. Naydihor*, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220.

sentencing court. The prosecutor could not keep relevant information from the sentencing court upon inquiry. *Id.*, ¶43. Thus, the prosecutor was required to answer truthfully regarding the sentence Xiong received and the reasons for the disparity between that sentence and the prosecution's recommendation. It is unreasonable to suggest that the only way the plea agreement could be honored was for the prosecutor to give false information about the disparity or refuse to answer.³ Her received the bargained benefit of a cap on the prosecution's sentencing recommendation and the recommendation was not undermined by the answer to the court's inquiry about the disparity. We conclude that giving an honest answer was not a substantial and material breach of the agreement.

¶9 Her argues that it was error to deny his postconviction motion on the ground that the sentence was not influenced by the prosecution's recommendation. We recognize that the trial court's denial of Her's postconviction motion was based in large part on its view that regardless of the prosecutor's recommendation, it determined a comparable sentence was justified and nothing in the record demonstrated that Her should receive a sentence different from Xiong's. If the prosecution has substantially and materially breached the plea agreement, prejudice is presumed. *State v. Howard*, 2001 WI App 137, ¶25, 246 Wis. 2d 475, 630 N.W.2d 244. Thus, the trial court's determination that the sentence would have been no different does not preclude a remedy if a substantial and material breach exists. However, no such breach occurred. We need not address further

³ Her does not seek to withdraw his plea but seeks specific performance of the plea agreement. Resentencing is of no avail because at resentencing the same truthful answer must be given.

Her's claim of ineffective assistance of counsel. *State v. Naydihor*, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

